

ESSAYS

THE CHARACTERISTICS OF AN OFFER IN CISG AND PECL

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Both CISG Article 14(1) and PECL Article 2.101 recognize the traditional “offer-acceptance” model of contracting.¹ The PECL also has a provision, Article 2.211, which deals with contracts not concluded through the traditional offer and acceptance mode.

Offer-acceptance, the only model explicitly addressed in the CISG, is the principal model in most legal systems of the world. However, it seems to be universally agreed that rules on the traditional model of offer-acceptance can be applied by way of analogy to other models, insofar as this is reasonable and with appropriate adaptations. The Comments on PECL Article 2.211 may, in this respect, be relevant to the proper interpretation of the CISG.²

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¹ See United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/CONF. 97/18, Annex I at art. 14(1), reprinted in 19 I.L.M. 668 [hereinafter CISG]; Principles of European Contract Law Parts I and II Combined and Revised, at art. 2.101 (Ole Lando & Hugh Beale eds. 2000) [hereinafter PECL].

² PECL, *supra* note 1, art. 2.211 explicitly extends its formation provisions to contractual situations that do not fit the traditional offer-acceptance model. The Comments to this provision of the PECL, available at <http://www.cisg.law.pace.edu/cisg/text/peclcomp14.html#2211>, cite the following as examples of situations

I. ANIMUS CONTRAHENDI

The offeror expresses with his proposal the intention to give an option to the offeree. With the acceptance, the offeree can conclude the contract according to the terms of the offer. This intention is referred to in Latin as: *animus contrahendi*. Both the CISG and the PECL demand *animus contrahendi* in an offer. For example, CISG Article 14(1) requires that the offer show the offeror's "intention to be bound," in case the offeree accepts. Under PECL Article 2.201(1)(a) an offer must be "intended to result in a contract if the other party accepts it."³

II. THE "SUFFICIENT DEFINITION" OF AN OFFER

An offer is not only the manifestation of the offeror's intention to conclude the contract; the offer must also contain all of the elements necessary for the successful conclusion of a valid contract. The completeness of an offer with regard to the contract itself (i.e., considering its terms) should be established *ex ante*: the necessary elements of proposal are those needed for validity of the future contract. More precisely, only an offer containing all of the requisite terms, thus making it suitable for acceptance, can lead to the successful formation of a contract. It is not necessary that these fundamental elements be regulated in the contract in a rigid and thorough way. There is a sufficient grade of determination if such elements are definable (i.e., if a contract provides the criteria for such a determination).

covered by an analogical application of the rules found in PECL provisions on offer and acceptance:

(a) the situation in which it is not easy to tell where in the negotiation process the parties reach an agreement which amounts to a binding contract of sale. See the elements required by PECL art. 2.201 which are sometimes hard to establish;

(b) the situation in which a certain type of contract is made by conduct alone (i.e., car park tickets, etc. [the explanation for this listing of a typical contract transaction with a consumer is that the PECL, which is applicable to consumer as well as commercial contract transactions, has a broader scope than the CISG]).

³ International Institute for the Unification of Private Law, Principles of International Commercial Contracts (Rome 1994), at art. 2.2 [hereinafter UNIDROIT Principles]. See also PECL, *supra* note 1, art. 2.102 (which deals with the determination of the parties' intention to be legally bound. Whether a party in fact has such intention is immaterial if the other party has reason to infer from the first party's statement or other conduct that the first party intends to be bound).

The type of a contract determines the requisite elements of the offer. The terms of the contract (using the criteria of their necessity for the formation of the contract) can be divided into three main groups: (i) *essentialia negotii* (terms without which the contract would have no sense); (ii) *naturalia negotii* (terms which regulate the parties' obligations logically stemming from the contract itself); and (iii) *accidentalia negotii* (terms which are not common for the type of contract in question but which could be the subject of its terms).

The offer must determine the *essentialia negotii* (the fundamental terms of the contract). The content of other elements of the contract can be derived from the parties' statements and behavior,⁴ or determined by a court, arbitrator or third person.

The relevant provisions in the PECL and the CISG demand the "sufficient definition" of a proposal for it to constitute an "offer" for the purposes of formation of the contract. While the PECL establishes this condition only in one laconic sentence,⁵ CISG Article 14(1) is more thorough in defining the key conditions for a sale of goods contract. This difference in treatment is due to the different scope of application of the two instruments. The CISG is the uniform code for the international commercial sale of goods with its scope limited to international sales contracts.⁶ The PECL, on the other hand, is designed to "be applied as general rules of contract law in the European Communities."⁷ The redactors of the PECL sought to create a frame applicable not only to international commercial contracts for the sale of goods, but to *all* contract transactions.⁸

In national codes, the fundamental elements (*essentialia negotii*) of a sales contract are the goods, quantity, and price. As

⁴ See CISG, *supra* note 1, art. 8; PECL, *supra* note 1, arts. 2.101 and 5.101 available at <http://www.cisg.law.pace.edu/cisg/text/peclcomp8.html>.

⁵ See PECL, *supra* note 1, art. 2.201(1)(a).

⁶ See CISG, *supra* note 1, art. 1 (which defines the CISG's concept of internationality); CISG, *supra* note 1, art. 2(a) (which excludes consumer sales).

⁷ PECL, *supra* note 1, art. 1.101(1); Cf. UNIDROIT Principles, *supra* note 3 (whose scope is broader than that of the CISG, but not as broad as the scope of the PECL). The UNIDROIT Principles "set forth general rules for [all] international commercial contracts." *Id.* at Preamble, para. 1. Therefore, the UNIDROIT Principles apply to international commercial contracts for the sale of goods as well as other international commercial contracts. See *id.*

⁸ For example, contracts for services as well as goods, domestic as well as international contracts, and contracts with consumers.

the subject of a sales contract, the goods are specified or determined by kind, quantity and quality. According to CISG Article 14(1), the quantity of the goods can be determined expressly or implicitly.⁹ The quality of goods is not expressly regulated by the formation provisions of the CISG. However, CISG Article 35 can be used for the determination of the goods' quality, when it is not determined by the contract itself.¹⁰ Since the CISG does not require the determination of the goods' quality as an element necessary for an offer to be deemed "sufficiently definite," the parties should agree, between themselves, upon the quality of goods expected by the parties to the transaction. If one party insists on a certain quality, and the offer does not express a clear agreement, there is no valid offer and acceptance, therefore there is no valid contract.¹¹

The PECL has a provision on "average quality" that is more specific than the CISG. The PECL demands that, "if the contract does not specify the quality, a party must tender performance of at least average quality."¹² Since the PECL does not provide a definition for "average quality," it leaves open the question of how courts and arbitrators will determine the average quality of performance or goods.¹³

⁹ In a contract of sale for which the PECL is the governing law, the quantity can also be determined not only expressly, but implicitly as well. See PECL, *supra* note 1, art. 6.102 (which provides criteria that establish "implied obligations").

¹⁰ See CISG, *supra* note 1, art. 35(2) (which contains the criteria for the determination of the conformity of goods in the sale contract).

¹¹ See Oberlandsgericht [Appellate Court] Frankfurt am Main [Germany] March 31, 1995 (25 U 185/94, available at <http://cisgw3.law.pace.edu/cases/950331g1.html>). The buyer alleged that, through the course of negotiation, the parties agreed on test tubes of "Duran" quality. The seller delivered tubes of "Fiolax" quality. The buyer refused to pay the price. The Court ruled that there was no valid contract, since the acceptance of the seller's offer was missing as the seller and the buyer had not reached an agreement on quality. Hence, there was no valid offer and acceptance; consequently, no validly concluded contract. See *id.*

¹² PECL, *supra* note 1, art. 6.108.

¹³ See UNIDROIT Principles, *supra* note 3, art 5.6. When dealing with a determination of a quality of performance which is neither fixed nor determinable by the contract, the criteria is one of reasonable quality of performance, as opposed to "average quality." See *id.* The PECL has defined the term "reasonableness." See PECL, *supra* note 1, art. 1.302. The reason why this criterion was not incorporated in the PECL as the supplemental remedy for determination of the quality of performance could not be seen, unless this is to be regarded as an implicit element of the PECL.

When the content of the contract is in question, there is a disagreement as to the CISG requirements on specification of (ability to determine) the price in the offer.

The CISG rules on price determination are contradictory. First, CISG Article 14(1) states that a determined price is a necessary part of an offer.¹⁴ However, CISG Article 55 provides that if the contract does not expressly or impliedly make provision for the price, "the buyer must pay the price generally charged by the seller at the time of the conclusion of the contract."¹⁵ By providing the criteria for the determination of a price that is not defined by the contract, it is presumed that a contract could be valid¹⁶ without a determined price, either by the contract itself or in the offer for its conclusion.

The requirement of a fixed or determinable price in CISG Article 14(1) was the subject of intensive debate both in the UNCITRAL deliberations and at the Vienna Diplomatic Conference.¹⁷ Proposals to eliminate the requirement of a fixed or

¹⁴ "A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provisions for determining . . . the price." CISG, *supra* note 1, art. 14(1).

¹⁵ Where a contract has been validly concluded but does not expressly or implicitly fix or make provisions for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.
CISG, *supra* note 1, art. 55.

¹⁶ CISG, *supra* note 1, art. 55 commences: "Where a contract has been *validly* concluded" (emphasis added). Warren Khoo calls attention to the meaning of this reference to validity. He states: "Article 55 . . . deals with cases in which a contract has apparently been concluded but without any agreement on provision as to price. In these instances, Article 55 makes it clear that its provision takes effect subject to the contract having been validly concluded by the criteria of the applicable domestic law. . ." COMMENTARY ON THE INTERNATIONAL SALES LAW 46 (Bianca & Bonell eds., 1987). The pre-Vienna Diplomatic Conference legislative history of the CISG is in accord. See United Nations Commission on International Trade Law (UNCITRAL) Y.B. VIII, 48-49, para. 323-30, 336-40, A/CN.9/SER.A/1977; see also JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 201 (2d ed. 1991).

¹⁷ A clear account of relevant recorded details in these drafting debates is available at:

(i) <http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting8.html>. Here one can access the summary records of the 8th meeting of the First Committee (Monday, March 17, 1980) on CISG arts. 14 and 55 [A/CONF.97/C.1/L.29, L.36, L.37, L.38, L.46, L.55 and L.69]. One will find in this record some very interesting comments and drafting alliances formed between countries irrespective of the level of

determinable price failed as a result of the opposition by the former Soviet Union, France, and a number of developing countries and States.¹⁸

The contradiction between CISG Articles 14(1) and 55 is evinced in the different approaches adopted in the literature. For example, Professor Honnold views the meaning of CISG Article 55 as "a contract may be 'validly concluded' even though it does not expressly or impliedly fix or make provisions for determining the price."¹⁹ On the other hand, Professor Farnsworth is

industrial/economic development. Note especially the position of France, whose representative (Mr. Ghestin) said that it was "important to retain the sentence as the essential terms of a sale were quality, quantity and price, the main difficulty being the question of the price. The issue was one of balance and fairness. It should be borne in mind that contracts frequently covered raw materials that were to be delivered over a period of years at prices that were difficult to fix (e.g., petroleum products)."

(ii) <http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting11.html>. Here one can access the Summary Records of the 11th Meeting of the First Committee (Tuesday, March 18, 1980) on CISG arts. 14 and 55. Report of *ad hoc* working group on paragraph 1 (A/CONF.97/C.1/L. 103). A report on the significance of the deliberations on CISG art. 14 based on notes taken at the Conference and published shortly thereafter was prepared by Prof. Schlechtriem, and is available at <http://www.cisg.law.pace.edu/cisg/biblio/slechtriem-14.html>.

¹⁸ See Jacob S. Ziegel, *Article 14, in Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods* (July 1981), available at <http://www.cisg.law.pace.edu/cisg/text/ziegel14.html>. "The Francophone countries and delegates from a substantial number of developing states felt that art. 12(1) [became CISG art. 14(1)] was doctrinally sound and necessary to prevent buyers being confronted by sellers with unreasonable prices after the goods had been delivered." *Id.*

Socialist countries objected to the conclusion of contracts with open-price terms, because the parties are expected to conform their contracts to a predetermined macroeconomic governmental plan. This view makes sense in a planned economy, in which contracts with open-price terms are a nullity from the perspective of the superintending state planning agency. Also, in some civil law systems, contracts of sale with open-price terms are viewed with hostility, particularly when the unilateral fixing of the price works to the disadvantage of the weaker party.

Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale Of Goods*, 18 YALE J. INT'L L. 1, 66 (1993), available at <http://www.cisg.law.pace.edu/cisg/biblio/hartnell.html>.

See also Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 443, 463 (1989), available at <http://www.cisg.law.pace.edu/cisg/biblio/garro1.html>.

¹⁹ JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALE UNDER THE 1980 UNITED NATIONS CONVENTION 163 (1982). Honnold states: "[T]he added provision, that in such case the parties are considered 'to have impliedly made reference' to the prices generally charged, precludes argument that failure to state the price

of the opinion that the requirement in CISG Article 14(1) must be met, so that the offer must contain the price.²⁰

This academic debate is based upon whether CISG Article 14(1) should be read alone, or in conjunction with Article 55.²¹ Some scholars²² hold that the most justified approach regarding the open-price term is that: The ultimate criteria for deciding whether a price is the necessary part of an offer or not must be determined by using the rules of the interpretation of the parties' statements.²³ If, even without the price term, the parties consider an offer sufficiently determined and, on the basis of such offer, conclude a sales contract, then there is no reason for the courts and arbitrators not to accept the contractors' will.

Gabuardi has concluded based upon the legislative history, doctrine and case law on CISG Articles 14(1) and 55 that:

[W]hile being silent about the discussion within the academic community, the courts have approached the issue of open-price terms in sales contracts acknowledging that articles 14 and 55 of

produces a fatal gap in the contract that contravenes the provisions on definiteness in article 14." *Id.*

²⁰ See E. ALLAN FARNSWORTH, FORMATION OF CONTRACT § 3.04, at 3-8 (1984). By his opinion, CISG Article 55 in Part III (which deals with the obligations of the parties according to an existing contract) was designed for use only where a Contracting State made a declaration under CISG Article 92(1) and it will not be bound by Part II of the CISG, and, more precisely, by CISG Article 14 placed in Part II.

²¹ "The Honnold position is that the provisions may be read together, while the Farnsworth position is that they cannot." Paul Amato, *U.N. Convention on Contracts for the International Sale of Goods – the Open Price Term and Uniform Application: An Early Interpretation by the Hungarian Courts*, 13 J. L. & COM. 1, 10 (1993), available at <http://www.cisg.law.pace.edu/cisg/biblio/amato.html>. See also Carlos A. Gabuardi, *Open Price Terms in the CISG, the UCC and Mexican Commercial Law*, available at <http://www.cisg.law.pace.edu/cisg/biblio/gabuardi.html>. The author provides an excellent comparative review of the issue of open-price terms. On point, Gabuardi agrees with Honnold that CISG Articles 14 and 55 regulate different issues and are not contradictory. "I think that [CISG] article 14 only establishes a rule for those cases in which the parties exchange 'offer' and 'acceptance' without making an express commitment to be bound even if the price has not been fixed, while [CISG] article 55 establishes a rule for those cases in which the parties enter into an agreement in which they commit themselves to be bound by it, even though the price has not been fixed." *Id.*

²² See Amato, *supra* note 21, at 1-27; J.E. Murray, Jr., *An Essay on the Formation on Contracts and Related Matters under the United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 11 (1988), available at <http://www.cisg.law.pace.edu/cisg/biblio/murray.html>.

²³ See CISG, *supra* note 1, art. 8; PECL, *supra* note 1, arts. 1.302 and 5.101; UNIDROIT Principles, *supra* note 3, arts. 4.1, 4.2. and 4.3.

[the] CISG deal with different issues; that is, article 14 deals with the issue of open-price terms at the time of the formation of the contract, while article 55 deals with open-price terms once the parties have already entered into a sales contract.²⁴

When the problem of the open-price term appears in a sale contract governed by the PECL as *lex contractus*, it is resolved by PECL Article 6.104. Unlike the CISG, when the price for goods or services is not determined by the contract, the PECL presumes that "a reasonable price" is in effect.²⁵ In commercial practice, the price can be determined as the prevailing price, as the average price, or in other similar ways.²⁶ In this situation, PECL Article 6.107 becomes quite important. According to this rule, if the price (or any other contractual terms) is to be determined by reference to a non-existing, ceased or non-accessible factor, the nearest equivalent factor shall be substituted.²⁷ The provisions of the PECL on "reasonable price," where the price cannot be determined by the contract, do not appear relevant to the proper interpretation of the CISG.

The PECL also deals with the possibility that the right to determine the price is given to a third party.²⁸ If the third party will not or cannot determine the price, "the parties are presumed to have empowered the court to appoint another person to determine it."²⁹

²⁴ Gabuardi, *supra* note 21.

²⁵ PECL, *supra* note 1, art. 6.104.

²⁶ Some national codes also use terms such as the "prevailing price." See e.g., U.C.C. § 2-724; Italian Codice Civile art. 1474(2); Yugoslav Code of Obligation art. 465(2) & (3).

²⁷ It is necessary to remember that CISG Article 55 prescribes that, subject to a validly concluded contract that does not expressly or implicitly contain a fixed price or provision for determining the price, "the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned."

²⁸ It should be emphasized that regulation of this question is quite justified and welcome with regard to the practical needs in commercial relations in which the parties can agree that the determination of the price is to be entrusted to commercial agents, trade chambers, stock exchanges, etc.

²⁹ PECL, *supra* note 1, art. 6.106(1). The rule adopted in the PECL trails the "in favorem contractus" principle, which is in accord with the needs and nature of international commercial exchange of goods, money and services. The UNIDROIT Principles also follows this approach in art. 5.7(3), which presumes the validity of a "reasonable price" in the event the third party did not determine the price.

In addition, the PECL regulates the situation in which the determination of the price (or any other contractual term) is left to one of the contract parties. When this is the case, and the determination is “grossly unreasonable, then notwithstanding any provision to the contrary, a reasonable price or other term shall be substituted.”³⁰

Non-fundamental elements of an offer are elements whose determination is not necessary for the validity of the offer and, consequently, for a contract to be concluded on the basis of such an offer. Those elements can be turned into fundamental elements if the parties express their will to have them so regarded. In the CISG, it can be concluded from Article 14(1), that the fundamental elements of an offer are the price, the quantity, and the goods. *A contrario*, other elements are non-fundamental,³¹ but can be turned into fundamental elements, if that is what the parties want. The redactors of the PECL explicitly sanction this possibility. According to PECL Article 2.103(2) (sufficient agreement), “if one of the parties refuses to conclude a contract unless the parties have agreed on some specific matter, there is no contract unless agreement on that matter has been reached.”³² However, if parties did not determine the content of the contract’s non-fundamental elements, this content should be evaluated according to PECL Article 6.102³³ or the

³⁰ PECL, *supra* note 1, art. 6.105. UNIDROIT Principles, *supra* note 3, art. 57(2) has the same effect. In practice, a contract clause that authorizes one party to determine the price is, in most cases, the consequence of a huge economic power inequality between the parties. National codes that allow only one party to be empowered to determine the price often restrict this discretion with the principle of good faith. *See, e.g.*, U.C.C. § 2-305(2). In that way, arbitrary or fraudulent use of this right is prevented. A similar interpretation is also valid for PECL Article 6.105.

³¹ Form, measurement and other features of the goods are examples of elements of offers and their acceptances that the CISG does not appear to regard as fundamental. *See* CISG, *supra* note 1, art. 65.

³² *See also* UNIDROIT Principles, *supra* note 3, art. 2.13.

³³ According to PECL Article 6.102, along with express terms, a contract may contain implied terms based on the intention of the parties, the nature and purpose of the contract, and good faith and fair dealing. In a wider sense, the content of non-fundamental elements can be derived from this rule. *See also* UNIDROIT Principles, *supra* note 3, arts. 5.1 and 5.2. Note that under PECL arts. 2:101 and 2:103, a contract is only concluded if the parties have agreed on its express terms. This rule must also apply when a party invokes standard terms or other not individually negotiated terms as part of the contract. *See, e.g.*, the effect of PECL art. 2:104.

rules for the interpretation of parties' intention.³⁴

III. THE DETERMINATION OF OFFER AD PERSONAM

Besides *animus contrahendi* and the element of "sufficient definition," an additional condition for a proposal to be considered an offer is the determination of the person for whom the offer is intended (determination of offer *ad personam*).

The importance of this is especially relevant to offers made using price lists, catalogues, public advertisement or other similar methods. Some national laws explicitly provide that such proposals are not offers.³⁵ The PECL, on the other hand, prescribes that an offer "may be made to one or more specific person or to the public."³⁶ Moreover, even "a proposal to supply goods or services at stated prices made by a professional supplier in a public advertisement or catalogue, or by a display of goods, is presumed to be an offer to sell or supply at the price until the stock of goods, or the supplier's capacity to supply the service, is exhausted."³⁷

This provision of the PECL is not relevant to the proper interpretation of the CISG because the general rule in the CISG seems not to regard such proposals extended to the public as offers. The CISG deems such a proposal as only an "invitation *ad offerendum*." CISG Article 14(2) states that a proposal addressed to other than one or more specific persons is to be "considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal."

This difference between the PECL and the CISG could be explained again by the different scope of application of the two. The CISG was drafted with the intent that it would be applied only to commercial sales. On the other hand, the PECL is designed to be applied as general rules of contract law in the European Communities.³⁸ The application of the PECL is not

³⁴ See *supra* note 22 and accompanying text. By way of comparison, it should be mentioned that the UNIDROIT Principles has a particular rule for "supplying an omitted term," e.g., for the situation in which the parties did not agree with respect to a term which is important for a determination of their rights and duties.

³⁵ See, e.g., Article 7(2) of the Swiss Code of Obligation.

³⁶ PECL, *supra* note 1, art. 2.201(2).

³⁷ *Id.* art. 2.201(3)(offer).

³⁸ See *id.* art. 1.101(1).

restricted to commercial contracts.³⁹ The rule in the PECL, which allows a public advertisement, a catalogue, etc. to be presumed as an offer, is the logical consequence of the scope of the PECL's application. PECL Article 2.201(3) protects the interest of consumers, who are in most cases the persons to whom such advertisements or similar proposals are intended, an area outside the realm of the CISG.

³⁹ By way of contrast, the UNIDROIT Principles are strictly intended to be applied to international *commercial* contracts. See UNIDROIT Principles, *supra* note 3, Purpose of the UNIDROIT Principles.